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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MATCONUSA LP,

CASE NO. C19-1952JLR

11 Plaintiff,

ORDER ON MOTIONS IN
12 v.
13 HOUSTON CASUALTY
14 COMPANY, et al.,
15 Defendants.

LIMINE

I. INTRODUCTION

16 Before the court are the motions in limine (“MIL”) filed by Plaintiff MatconUSA
17 LP (“Matcon”), Defendant Houston Casualty Company (“Houston”), and Defendant
18 Marsh USA Inc. (“Marsh”). (Matcon MIL (Dkt. # 134); Matcon Supp. MIL (Dkt. # 155);
19 Houston MIL (Dkt. # 130); Marsh MIL (Dkt. # 136).) Each party has responded to the
20 other parties’ motions in limine. (Matcon Resp. (Dkt. # 146); Houston Resp. (Dkt.
21 # 149); Marsh Resp. (Dkt. # 148).) The court has reviewed the motions in limine, the
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1 parties' briefing, the remainder of the record, and the applicable law. In addition, the
2 court heard oral argument and made oral rulings on the motions in limine during the
3 parties' pretrial conference on August 15, 2022. (*See* 8/15/22 Min. Entry (Dkt. # 156).)
4 The court summarizes its oral rulings below.

5 II. MOTIONS IN LIMINE

6 A. Houston's Motions in Limine

7 Houston brings three motions in limine. (*See* Houston MIL.) For the reasons
8 stated below and on the record during the pretrial conference, the court rules as follows:

9 1. Houston's MIL 1, to preclude Matcon from introducing the alleged CR 2A
10 agreement from the underlying lawsuit at trial, is GRANTED as unopposed.

11 2. Houston's MIL 2, to preclude Matcon from offering its exhibit titled
12 "Backup Documents of Claim," is GRANTED as unopposed by Matcon. Matcon may
13 not use the Backup Documents of Claim exhibit to prove damages caused by Houston.
14 Matcon may, however, use the documents to prove damages caused by Marsh.

15 3. Houston's MIL 3, to exclude defense invoices that Matcon failed to
16 produce before the discovery cutoff, is DENIED. Although Matcon did not produce
17 these invoices until July 7, 2022, the court is persuaded that the failure to disclose was
18 harmless where Houston conducted no discovery relating to the timely-produced
19 invoices, which represented a far greater sum of money. *See* Fed. R. Civ. P. 37(c)(1).

20 B. Marsh's Motions in Limine

21 Marsh brings seven motions in limine. (*See* Marsh MIL.) For the reasons stated
22 below and on the record during the pretrial conference, the court rules as follows:

1 1. Marsh's MIL 1, to exclude evidence, testimony, or argument regarding the
 2 standard of care allegedly breached by Marsh because Matcon has failed to identify any
 3 expert witnesses, is GRANTED. "In general, expert testimony is required when an
 4 essential element in the case is best established by an opinion which is beyond the
 5 expertise of a layperson." *Harris v. Groth*, 663 P.2d 113, 118 (Wash. 1983); *see also*
 6 *AAS-DMP Mgmt., LP Liquidating Tr. v. Acordia Nw., Inc.*, 63 P.3d 860, 865 (Wash. Ct.
 7 App. 2003) ("Generally, if the act in question is within the ordinary knowledge and
 8 experience of laypersons, we have not required expert testimony."). The court is
 9 persuaded that what a reasonable Owner-Controlled Insurance Program ("OCIP")
 10 Administrator / Broker would do under the circumstances presented in this case is not
 11 within the ordinary knowledge and experience of laypersons. Therefore, expert
 12 testimony is necessary to establish the standard of care.¹

13 2. Marsh's MIL 2, to exclude evidence, testimony, or argument related to
 14 Matcon's underlying settlement with Graham Construction & Management, Inc.
 15 ("Graham") and Project Stewart, is GRANTED as unopposed.

16 3. Marsh's MIL 3, to exclude evidence, testimony, or argument concerning
 17 damages related to non-payment by Graham because these damages are at issue in the

18 1 In its briefing and at oral argument, Matcon cited *Douglas v. Freeman*, 814 P.2d 1160,
 19 1165 (Wash. 1991) for the proposition that expert testimony is unnecessary once the court
 20 decides the applicable duty of care. (See Matcon Resp. at 2-3.) Matcon misreads *Douglas*. That
 21 corporate negligence case involved a dental clinic's duty to supervise a student dentist. *Douglas*,
 22 814 P.2d at 1162, 1164. The issue was whether the standard of care to satisfy that duty included
 providing the student dentist with a dental assistant. *Id.* at 1164. The Washington Supreme Court
 concluded that the dentist's own testimony, as an adverse witness in the plaintiff's case in chief,
 that he would "never do a surgical [wisdom tooth] extraction without an assistant" was sufficient
 to establish the standard of care. *Id.* at 1165 (noting that other jurisdictions had "stated expressly

1 underlying lawsuit is DEFERRED. Marsh may file a reply in support of its MIL 3, of no
2 more than three pages in length, by no later than **Thursday, August 18, 2022**. Marsh's
3 reply shall address Matcon's arguments that Marsh can seek either contribution from
4 Graham under RCW 4.22.040 or an offset after the underlying lawsuit is resolved.

5 4. Marsh's MIL 4, to preclude Matcon from offering or eliciting evidence,
6 testimony, or argument about Marsh's size, profitability, or financial resources, is
7 GRANTED as unopposed.

8 5. Marsh's MIL 5, to preclude Matcon from offering or eliciting evidence,
9 testimony, or argument about any other professional malpractice lawsuits or claims
10 against Marsh, is GRANTED as unopposed.

11 6. Marsh's MIL 6, to preclude Matcon from offering or eliciting evidence,
12 testimony, or argument about OCIPs from other cases or projects, or any claims under
13 such OCIPs, is GRANTED as unopposed.

14 7. Marsh's MIL 7, to preclude Matcon from making statements to the jury
15 suggesting the need to "send a message" or "put yourself in plaintiff's shoes" or apply the
16 "Golden Rule," is GRANTED as unopposed.

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20 that a defendant, testifying as an adverse witness, may provide the expert testimony that
21 establishes the standard of care in a medical malpractice case"); *see also id.* ("Once the
22 applicable standard of care is established *by experts*, further expert testimony is not required to
prove a breach of that standard") (emphasis added). At no point did the Court hold that expert
testimony is unnecessary after a court decides the applicable duty of care. *See generally id.*

1 **C. Matcon's Motions in Limine**

2 Matcon brings 13 motions in limine, including a supplemental motion in limine it
3 filed on August 12, 2022. (*See* Matcon MIL; Matcon Supp. MIL.) For the reasons stated
4 below and on the record during the pretrial conference, the court rules as follows:

5 1. Matcon's MIL A, to exclude witnesses or document evidence submitted by
6 Marsh for failure to make initial disclosures, is DENIED to the extent Matcon seeks a
7 blanket exclusion of all of Marsh's witnesses and exhibits. Matcon may file, by no later
8 than **Thursday, August 18, 2022**, a motion to exclude specific witnesses or exhibits
9 under Federal Rule of Civil Procedure 37(c)(1). Marsh may file a response to Matcon's
10 motion, if any, by no later than **Monday, August 22, 2022**.

11 2. Matcon's MIL B, to exclude expert testimony by lay witnesses, is
12 GRANTED. *See* Fed. R. Evid. 701, 702.

13 3. Matcon's MIL C, to exclude argument or inference that Marsh notified the
14 OCIP insurers about Matcon's insurance claims, is GRANTED as unopposed.

15 4. Matcon's MIL D, to exclude argument or inference that Matcon was
16 obligated to follow up with Marsh after sending its tenders, is DENIED. Marsh is
17 entitled to make these arguments in support of its affirmative defenses of failure to
18 mitigate and contributory negligence.

19 5. Matcon's MIL E, to exclude argument or inference that Matcon's alleged
20 damages against Marsh are related to indemnity coverage, is DEFERRED. Matcon may
21 file a reply in support of its MIL E, of no more than three pages in length, by no later than
22 **Thursday, August 18, 2022**.

1 6. Matcon's MIL F, to exclude argument or inference that Houston had no
2 duty to defend Matcon in the underlying lawsuit, is DEFERRED. Matcon may file a
3 reply in support of its MIL F, of no more than three pages in length, by no later than
4 **Thursday, August 18, 2022.** Matcon's reply shall address Houston's argument that it is
5 entitled to argue to the jury that it had no duty to defend some or all of the claims against
6 Matcon in the underlying lawsuit based on its express reservation of rights. (*See* Houston
7 Resp. at 2-3.)

8 7. Matcon's MIL G, to exclude argument or inference that Houston timely
9 offered to defend Matcon, is DENIED. The court did not rule at summary judgment that
10 Matcon's October 7, 2019 notice of intent to sue constituted a tender of claims as a
11 matter of law. (*See* 7/14/22 Order (Dkt. # 129) at 39-40.)

12 8. Matcon's MIL H, to exclude argument or inference that Houston did not
13 deny Matcon's claim, is DENIED. The court did not rule at summary judgment that
14 Matcon's October 7, 2019 notice of intent to sue constituted a tender of claims as a
15 matter of law. (*See id.*)

16 9. Matcon's MIL I, to exclude argument or inference that Houston "cured" its
17 breach of contract or bad faith conduct, is DENIED.

18 10. Matcon's MIL J, to exclude opinions about what the insurance policies
19 cover, is GRANTED IN PART and DENIED IN PART. Lay witnesses may testify about
20 why they took certain steps and made certain decisions, which may require them to
21 testify regarding their understanding of the insurance policies. Lay witnesses, however,
22 may not testify as to legal conclusions such as the correct interpretation of a contract or

1 the meaning of policy provisions. *United States v. Bohn*, 622 F.3d 1129, 1138 (9th Cir.
2 2010).

3 11. Matcon's MIL K, to exclude argument or inference that insurer bad faith
4 requires a showing of "malice" or "intent," is GRANTED. See Wash. Pattern Jury Instr.
5 320.02.

6 12. Matcon's MIL L, to exclude prior court orders, is GRANTED in part. The
7 motion is GRANTED to the extent that this court's prior orders shall not be introduced as
8 evidence and DEFERRED to trial to the extent Matcon seeks to exclude argument or
9 inference that conflicts with those orders.

10 13. Matcon's supplemental MIL M, to exclude argument or inference that
11 Sedgwick's employee, Scott Fankhauser, was not a representative of Project Stewart LLC
12 ("Project Stewart"), is DENIED. The court has reviewed the record excerpts cited by
13 Matcon in its brief and by Marsh at oral argument. Whether and to what extent Mr.
14 Fankhauser was a representative of Project Stewart is a question for the jury.

15 III. OTHER PRETRIAL MATTERS

16 There are 38.5 total hours of trial time available in this matter. The court reserves
17 3.5 of those hours for its own purposes. As a result, 35 hours remain available to the
18 parties. As the plaintiff, Matcon is entitled to 17.5 of those hours. The court directs
19 Marsh and Houston to confer regarding a fair division of the remaining 17.5 hours and to
20 file a joint statement, by no later than **Friday, August 19, 2022**, setting forth their
21 proposal for dividing this time. If Marsh and Houston are unable to agree on how to
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1 divide this time, each Defendant shall include in the joint statement its position on how
2 this time shall be allocated.

3 Dated this 16th day of August, 2022.

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JAMES L. ROBART
United States District Judge

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